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NO. 91-1780

IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM 1991

STATE OF COLORADO,

Petitioner,

v.

JOHN HARVEY GASKINS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

BRIEF AMICI CURIAE OF THE STATE OF SOUTH DAKOTA, ET AL.

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BRIEF OF SOUTH DAKOTA AND THE STATES THAT APPEAR IN THE APPENDIX AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

Pursuant to Rule 37 of the rules of this Court, the states of South Dakota et al. submit this brief as amici curiae in support of Colorado's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

In 1987, Respondent, John Harvey Gaskins, was convicted of attempted theft. This was his fourth felony conviction. He was previously convicted of assault on a police officer, attempted criminal trespass, and theft. He was sentenced, under Colorado's recidivist statute, to life in prison with possible parole after 40 years.

In 1992, the Colorado Supreme Court decided that Respondent's sentence was properly subject to a full proportionality review to determine whether it violated the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution. The Colorado Supreme Court found that Respondent's crimes were not serious enough to justify a life sentence without further inquiry. It therefore remanded to the trial court for an examination of the facts underlying each of

Respondent's convictions and for possible comparison of the Respondent's sentence with other sentences from Colorado and other jurisdictions.

INTEREST OF THE AMICI CURIAE

The amici curiae are all charged with the responsibility of enforcing the statutory recidivist schemes fashioned by their respective state legislatures. Their effort will be assisted by a decision addressing some of the questions that have arisen since this Court issued Rummel v. Estelle, 445 U.S. 263 (1980), and Solem v. Helm, 463 U.S. 277 (1983). The amici states desire further guidance on the extent to which the Eighth Amendment limits a state's ability to deter recidivism by imposing long prison sentences.

SUMMARY OF THE ARGUMENT

The amici states request that this Court grant the writ for two reasons. First, other courts in the nation require guidance on

determining whether the sentence of habitual offenders will be considered disproportionate under the Eighth Amendment. The amici states also feel that lower courts need guidance as to when, if ever, it is required that they engage in a full proportionality review of a prison sentence imposed under habitual offender schemes. Such review, including review of sentences for the same or similar crimes in the jurisdiction of the court, as well as outside the jurisdiction of the court, can be particularly burdensome. Some confusion has arisen due to apparent inconsistency between certain of this Court's cases and the reaction of the lower courts to them. The states thus seek guidance on the issues of when a sentence will be held unconstitutional and when an extensive proportionality review will be required.

Second, the amici states believe that if this Court were to authoritatively treat the

issue of constitutionality of punishment under habitual offender schemes, it would be more apparent to state legislatures and state courts what sort of punishment options are available, and what the consequences of adoption of a particular scheme would be. It is important for state courts and state legislatures to know whether their sentencing choices will result in burdensome proportionality review. If such review is to be granted in most, or all, cases involving habitual offenders, states might be deterred from enforcing habitual offender statutes. If little, or no, proportionality review is required, states would be better able to carry out their laws. The amici states believe that these issues ought to be answered, so as to give that states a clear picture of their choices in habitual offender sentencing as well as a clear picture of what the consequences of their choices will be.

This case provides an ideal vehicle for giving such guidance, and the writ should, therefore, be granted.

REASONS FOR GRANTING THE WRIT

A. Lower courts need guidance on determining whether a recidivist's sentence is disproportionate under the Eighth Amendment.

This Court should address the issues presented in this case because it will help define a relationship fundamental to our criminal justice system--the interplay between a state's duty to define and punish criminal behavior (in the manner chosen by its elected legislature) and the courts' duty to protect rights guaranteed under the Eighth Amendment.

This relationship is clear in theory. The states cannot impose sentences that violate the Eighth Amendment. See Robinson v. California, 370 U.S. 660 (1962) (the Eighth Amendment is applicable to the states

through the Fourteenth Amendment). Aside from constitutional limitations, the function of the legislature is primary. "There is a certain subordination of the judiciary to the legislature, and its presumptions of legality are not lightly to be interfered with, nor attacked based on judges' notions of right and wrong." United States v. Gonzalez, 922 F.2d 1044, 1052 (2nd Cir. 1991), quoting Weems v. United States, 217 U.S. 349, 379 (1910).

Many practical features of this relationship remain unsettled. It is currently unclear, for example, what circumstances require a lower court to conduct a full proportionality review of a prison sentence imposed under a state's

recidivist scheme.[1] It is also unclear what weight should be given to a defendant's previous convictions when a lower court is comparing the gravity of an offense to the severity of a sentence imposed under a state's recidivist scheme.

To some extent, the uncertainty in this area results from this Court's somewhat inconsistent treatment of the issues in

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[1]The amici curiae consider a "full proportionality review" to be a review beyond a threshold comparison of the type of offense and the penalty imposed. Such a review may involve an examination of the specific facts surrounding the offenses (such as the review ordered in this case). It may involve an examination of Solem's second and third factors: i.e., a comparison of the challenged sentence with other sentences from the same jurisdiction, or a comparison with sentences imposed for the same crime in other jurisdictions. The amici believe that a lower court should refrain from conducting a full proportionality review unless one is required under the constitution. Such reviews are very burdensome, and should not be conducted every time a court may, as a matter of discretion, find it desirable.

Rummel and Solem. These decisions reached different conclusions on largely similar facts. The Solem court thought that a full proportionality review was necessary. The Rummel court did not. The Solem court did not accord as much weight to the defendant's previous convictions as did the Rummel court. Thus, confusion arose. See Harmelin v. Michigan, 111 S.Ct. 2680, 2703 (1991) (Justice Kennedy, concurring) (Solem appeared to apply a different analysis than in Rummel). See also United States v. Gonzalez, 922 F.2d 1044, 1052 (2nd Cir. 1991) (Rummel and Solem are difficult to harmonize).[2]

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[2]The lower courts' attempts to reconcile Rummel and Solem have led to a split in the circuits on the extent to which the availability of parole affects the necessity of conducting a proportionality review. The third, fifth, and sixth circuits would find proportionality reviews unnecessary when the defendant's life sentence includes the

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This Court's decision in Harmelin v. Michigan, supra, does not dispel the confusion. Harmelin indicates that a full proportionality review is not appropriate unless "a threshold comparison of the crime committed and the sentence imposed leads to a inference of gross disproportionality." Id. 111 S.Ct. at 2707 (Justice Kennedy, concurring). It does not indicate how a

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possibility of parole. See United States v. Rosenberg, 806 F.2d 1169, 1175 (3rd Cir. 1986), cert. denied, 481 U.S. 1070 (1987); Moreno v. Estelle, 717 F.2d 171, 180-81 (5th Cir. 1983), cert. denied, 466 U.S. 975 (1984); Chandler v. Jones, 813 F.2d 773, 778-79 (6th Cir. 1987). The eleventh circuit, on the other hand, rejects the view that the availability of parole is sufficient to avoid a proportionality review. Marrero v. Dugger, 823 F.2d 1468, 1472-73 (11th Cir. 1987). That circuit would find a proportionality review unnecessary if the defendant's convictions were more numerous and serious than those in Rummel, and if the defendant's sentence includes a possibility of parole. See Williams v. Johnson, 845 F.2d 906, 909-11 (11th Cir. 1988).

defendant's previous convictions are to be counted when the "crime committed" is compared to the sentence imposed. Nor does it define "gross disproportionality" in such a way as to be capable of application to different types of cases.[3] See United States v. Harvey, 946 F.2d 1375, 1378 (8th Cir. 1991) ("a majority of the [Harmelin] Court did not agree to what extent the Eighth Amendment requires proportionality review in

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[3]The view most capable of uniform application in Harmelin was endorsed by only two justices. This view would overrule Solem and hold that the Eighth Amendment requires no proportionality reviews when an individual is sentenced to prison for conduct properly classifiable and punishable as criminal. Id. 111 S.Ct. at 2684-2701 (Justice Scalia, joined by the Chief Justice). Three concurring justices rejected this view, not because they thought it incorrect, but because they believed that a narrow proportionality principle must be recognized under the doctrine of stare decisis. Id. 111 S.Ct. at 2702 (Justice Kennedy concurring, joined by Justice O'Connor and Justice Souter).

non-capital cases. . . ."); United States v. Lowden, 955 F.2d 128, 131 (1st Cir. 1992) (after Harmelin, it is a "doubtful proposition" whether inter-jurisdictional comparisons remain material to eighth amendment analysis).

The amici states believe that this case presents an opportunity for addressing these areas of confusion. Respondent's triggering offense, attempted theft, is not generally regarded as a serious felony. It is probably not as serious as the offense in Harmelin (possessing more than 650 grams of a controlled substance), although it is probably more serious than the triggering offenses in Rummel or Solem (stealing $127.75 by false pretenses; uttering a "no account" check for $100). If Respondent's prior offenses, including a violent offense, provide substantial justification for the life sentence in this case, then there should

be little or no need for proportionality review in cases where a recidivist is sentenced for a more serious felony under the statutes of any state.

B. Authoritative treatment of the issues would help define the range of practical choices available to state legislatures when they fashion an individual state's recidivist scheme.

The issues presented in this case are of significant interest to the states. Almost all state legislatures have adopted some statutory scheme designed to deter recidivism.[4] Those states that have no

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[4]Ala. Code § 13A-5-9 (1982); Alaska Stat. § 12.55.125 (1990); Ariz. Rev. Stat. Ann. § 13-604 (1984); Ark. Stat. Ann. §§ 5-4-501 through 504 (1987); Cal. Penal Code § 667 (West 1992 Supp.); Colo. Rev. Stat. § 16-13-101 (1986); Conn. Gen. Stat. § 53a-40 (1991); Del. Code Ann. tit. 11, § 4214 (1990 Supp.); D.C. Code Ann. §§ 22-104, 104a (1981); Fla. Stat. Ann. § 775.084 (West 1992 Supp.); Ga. Code Ann.

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recidivist scheme may wish to adopt one in

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§ 17-10-7 (1990); Haw. Rev. Stat. § 706-606.5 (1991 Supp.); Idaho Code § 19-2514 (1987); Ill. Rev. Stat. ch. 38, para. 33B (Smith-Hurd 1992 Supp.); Indiana Code Ann. §§ 35-50-2-7.1, 8 (Burns 1992 Supp.); Iowa Code § 902.8 (1991); Kan. Stat. Ann. § 21-4504 (1991 Supp.); Ky. Rev. Stat. Ann. § 532.080 (Michie/Bobbs-Merrill 1990); La. Rev. Stat. Ann. § 15:529.1 (West 1992); Me. Rev. Stat. Ann. tit. 29, § 2292 (1991 Supp.) (motor vehicle only); Md. Criminal Code Ann. art. 27, § 643(B) (1987); Mass. Gen. Laws Ann. ch. 279, § 25 (West 1981); Mich. Comp. Laws §§ 28.1082-1084 (1991 Supp.); Minn. Stat. § 609.152 (1990); Miss. Code Ann. §§ 99-19-81, 83 (1991 Supp.); Mo. Ann. Stat. § 558.016 (Vernon 1992 Supp.); Mont. Code Ann. §§ 46-18-501, 502 (1991); Neb. Rev. Stat. § 29-2221 (1989); Nev. Rev. Stat. § 207.010 (Michie 1986); N.H. Rev. Stat. Ann. § 651:6 (1991 Supp.); N.J. Rev. Stat. § 2C:44-3 (1991 Supp.); N.M. Stat. Ann. § 31-18-17 (1990 Supp.); N.Y. Penal Law §§ 70.04, 70.06 (McKinney 1987); N.C. Gen. Stat. § 14-7.1 (1986); N.D. Cent. Code § 12.1-32.09 (1991 Supp.); Ohio Rev. Code Ann. § 2929.12 (Anderson 1991 Supp.); Okla. Stat. tit. 21 §§ 51 through 54 (West 1991 Supp.); Or. Rev. Stat. § 161.725 (1991); 42 Pa. Cons. Stat. § 9714 (Purdon 1991 Supp.); R.I. Gen. Laws § 12-19-21 (1991 Supp.); S.C. Code Ann. § 17-25-45 (Law. Co-op. 1991 Supp.); S.D. Codified Laws Ann. §§ 22-7-7
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the future. Thus, all states would benefit from knowing more precisely how the Eighth Amendment limits a legislature's ability to punish repeat offenders.

As a practical matter, the states are keenly interested in avoiding unnecessary judicial review of prison sentences. The price of defending sentences in judicial proceedings is already too high. To the extent courts require full proportionality review, there is a real danger that the states will be unable to enforce recidivist statutes. Lacking the resources to defend sentences, law enforcement officials may

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through 11 (1988); Tenn. Code Ann. § 40-35-106 through 108 (1990); Tex. Penal Code Ann. § 12-42 (Vernon 1992 Supp.); Utah Code Ann. §§ 76-8-1001, 1002 (1990); Vt. Stat. Ann. tit. 13, § 11 (1991 Supp.); Wash. Rev. Code §§ 9.92.090 through .110 (1989); W.Va. Code § 61-11-18 (1989); Wis. Stat. § 939.62 (1989); Wyo. Stat. § 6-10-201 (1988).

choose not to charge under these statutes. This would frustrate the state's interests as surely as a declaration that a sentencing scheme is facially unconstitutional.

The states are also interested in knowing what approaches can be enforced with minimal expenditure of resourses. It is not enough that a sentence will be found constitutional after lengthy proportionality review. States wish to impose sentences that will be recognized as constitutional without such review. This Court should define the range of practical choices from which state could select to combat crime. Because of this need for guidance, not only to courts but also to legislatures, the writ should be granted.

CONCLUSION

For the reasons stated above, the amici states urge this Court to grant Colorado's petition for writ of certiorari.

Dated this 3rd day of June, 1992.

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